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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. [redacted] 96

CUSTOM BUILT HOMES CO., INC.,
Petitioner,

vs.

KANSAS STATE COMMISSION OF REVENUE AND TAXATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

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CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3 2

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Custom Built Homes Co., Inc., respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Kansas entered in the above-entitled cause on January 24, 1959.

OPINIONS BELOW.

The finding of facts and law and order of the State Commission of Revenue and Taxation of the State of Kansas

(Tr. 6-8, A1-A3)[1] are not reported, nor are the findings of fact and conclusions of law of the District Court for Johnson County, Kansas (Tr. 25-29, A4-A7). The opinion of the Supreme Court of Kansas is reported in 184 Kan. 31, 334 P.2d 808 (1959).

JURISDICTION.

Jurisdiction in this Court is conferred by 28 U.S.C., Sec. 1257 (3), 62 Stat. 929. The judgment of the Supreme Court of Kansas sought to be reviewed was entered on January 24, 1959. A timely Motion for Rehearing was denied March 11, 1959.

QUESTION PRESENTED FOR REVIEW.

Whether or not the State of Kansas may collect a Compensating Use Tax assessed against the use of tangible personal property when said property is in a continuous interstate journey until the moment it is affixed to and becomes a part of real estate within the State of Kansas.

CONSTITUTIONAL PROVISION INVOLVED.

This case involves the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States:

> "Congress shall have power to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

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[1]Citations preceded by the letters Tr. refer to pages of the Transcript of Record certified by the Clerk of the Kansas Supreme Court. Citations preceded by the letter A refer to pages in the Appendix to this petition.

STATEMENT OF THE CASE.

This case arises out of a Use Tax assessment made by the respondent against the petitioner herein on the alleged use of tangible personal property between the periods from October 1, 1951 to September 30, 1958, inclusive.

During this period of time your petitioner, Custom Built Homes-Co., Inc., was engaged in the business of selling houses in a housing development in Wyandotte County, Kansas. The houses so sold were prefabricated houses, purchased by petitioner under contract from Page & Hill Homes, Inc., a Minnesota corporation. Under the terms of the contract Page & Hill was to deliver the houses "F.O.B. Building Site, Wyandotte County, Kansas".

The houses were delivered in the following manner: the prefabricated sections were loaded onto the Page & Hill trucks at its factory in Minnesota, and the trucks were driven to the building site by Page & Hill employees. Upon entering the area, the Page & Hill operators were directed to a particular foundation which had previously been laid and covered with subflooring by petitioner's employees. On arriving at such foundation, the Page & Hill operator would unload the prefabricated sections by means of a crane attached to the truck. He would hook the crane onto the section in the truck and swing said section into place on the foundation. While the sections were still hooked to the crane, they would be nailed in place. After the sections were thus secured the crane hook would be released. This process was used for exterior and interior sections constituting about 75% of the house.

The roof and ceiling sections, comprising about 15% of the total dollar value of the house, were unloaded manually, and by the use of rollers, but were moved directly

from the truck to their position on the house. Miscellaneous loose items, constituting 10% of the house, were unloaded manually and in some instances stored temporarily, and in other instances, applied directly to the house. Petitioner does not contest the tax on said loose items.

As a part of the financing of the construction, Page & Hill took a mortgage on the lots to which the prefabricated houses were to be attached.

The parties have stipulated that the assessment herein is $22,133.57 plus $1,257.33 interest, plus interest at the rate of one percent (1%) per month from June 24, 1955 on $22,133.57.

This cause was first heard by the State Commission of Revenue and Taxation of the State of Kansas on March 29, 1956. The petitioner herein raised the interstate commerce question in its brief submitted to the Commission and by oral argument. The Commission, in its Order, found (Tr. 7):

> "7. That the Custom-Built Homes Inc., did use, store and consume tangible personal property within the State of Kansas after it ceased to be a part of interstate commerce, within the contemplation of the Kansas Compensating Tax Law."

The decision of the State Tax Commission was appealed to the District Court of Johnson County, Kansas. In the Notice of Appeal (serving as the petition for review) petitioner reiterated its position that the prefabricated house sections were continuously in interstate commerce until becoming affixed to the real estate (Tr. 11, 12). The hearing upon the appeal was held May 28, 1957. In its Journal Entry filed February 17, 1958 (Tr. 25-29), the District Court found that title to the interior and exterior sections passed to petitioner at the instant the crane hooks

were disconnected from the prefabricated sections, and that at said time the sections were only temporarily affixed to the foundation and were, therefore, tangible personal property subject to the Use Tax. The Court also found that title to the roof and ceiling sections and the loose items passed at the time said items were unloaded from the truck, and that these items also constituted taxable tangible personal property at said time. The District Court in its Conclusions of Law (Tr. 29) thus ruled:

> "3. That the order made by the Commission of Revenue and Taxation of the State of Kansas is valid and not repugnant to the Constitution of the United States or the laws of the State of Kansas."

Petitioner's Motion to Amend and Reconsider the District Court's finding (Tr. 30) was overruled (Tr. 31).

Thereupon, petitioner appealed to the Kansas Supreme Court alleging in its Specifications of Error (Tr. 34-36) that the Conclusions of Law of the District Court were not supported by and were contrary to the evidence.

The Kansas Supreme Court acknowledged the following to be the controlling issue herein (A8):

> "The question presented is whether under a sales contract the appellant used, stored or consumed prefabricated house sections as tangible personal property within the State of Kansas after said sections had ceased to be a part of interstate commerce and prior to their becoming affixed as real estate within the State."

The Court (A19) also acknowledged that the time when title is deemed to pass need not correspond with the time when the interstate commerce journey ceases. Nevertheless, the Court proceeded to first determine the question of when title passed to petitioner. Reversing the

District Court, it found that the terms of the Custom Built-Page & Hill contract, "F.O.B. Building Site in Wyandotte County", clearly and unambiguously meant that title passed upon delivery to petitioner free on board the semi-trailer at the building site in Wyandotte County, Kansas, thus holding that title to all of the items passed as they were taken off the semi-trailer.

On the interstate commerce question, the Court held (A26):

> "We have no hesitance in declaring that at some point after the interstate journey of the merchandise in question had come to an end, it occupied the status of tangible personal property and as such was used, stored or consumed by the appellant within the contemplation of the Kansas Compensating Tax Act prior to its becoming affixed as real property."

In its Motion for Reconsideration and Reversal of the Opinion or in the Alternative, Motion for Rehearing, which was denied on March 11, 1959, petitioner again raised the interstate commerce issue (Tr. 62-71).

Petitioner herein seeks review of the decision of the Kansas Supreme Court.

REASONS FOR GRANTING THE WRIT.

Since *Coe* v. *Errol*, 116 U.S. 517 (1886), this Court has repeatedly and uncontrovertedly held that personal property while in transit in an interstate commerce journey is immune from state and local taxes. The mere imposition of such a tax constitutes an interference with, and places an undue burden upon, interstate commerce. *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307 (1938).

The general rule applicable to the instant fact situation has been enunciated by this Court in *Henneford* v. *Silas*

Mason Co., 300 U.S. 577 (1937) and *Southern Pac. Co. v. Gallagher*, 306 U.S. 167 (1939). In each of these cases a State Use Tax was upheld as Constitutional because, and only because, there existed a taxable moment or event after the interstate commerce journey had ceased, and that during this taxable moment the taxpayer used the property while said property was within the taxable jurisdiction of the State. Both decisions emphasize that in absence of the taxable moment the tax would have been forbidden as an Unconstitutional burden.

In the instant case there was no taxable moment to support an assessment of the State Tax, and thus the decision reached by the Kansas Supreme Court is in direct conflict with the foregoing rule.

The interstate journey of these prefabricated houses began with the loading of the prefabricated sections on the Page & Hill trailer-tractor in Minnesota and did not end until said sections had been affixed to real estate in Wyandotte County, Kansas.

The question presented by this petition for certiorari has not been previously decided, but has become one of exceeding importance in the recently innovated, but rapidly expanding field of prefabricated home manufacturing, delivery and construction. This industry has developed in the last seven or eight years *from* the experimental stage to constitute a sizable portion of the home building industry and from a few manufacturers to a field of approximately 42 manufacturers, members of the Home Manufacturing Association, doing business on a nation-wide basis. Recent publications indicate that the industry has grown to an approximate 10% of the home building industry involving the annual construction of an excess of 100,000 homes and an annual sales volume in excess of $1,000,000,000. The prefabricated house sections are manu-

factured at a plant location, shipped in interstate commerce to the various states of the Union. They are delivered in manners very similar to the delivery in this case, and thus the particular question raised by this petition is not unique, but one of tremendous import, to a very sizable segment of one of the Nation's important industries.

The crucial question in determining whether or not the State taxing power may be exerted is that of continuity of transit. *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929), *State of Minnesota* v. *Blasius*, 290 U.S. 1 (1933). As this Court pointed out in the *Blasius* case, the question of cessation or interruption of an interstate journey is always one of substance and the particular occasion or event sought to be taxed must be considered.

Here there was no break in the continuity of transit. Petitioner submits that as a practical matter and by virtue of the understanding between Custom Built Homes Co., Inc., and Page & Hill, the houses were not "delivered" until they had been unloaded by the Page & Hill crane. When the unloading was completed, the sections had become a part of the realty. That the act of unloading does not break the continuity of transit and thereby end the interstate commerce journey is supported by a number of decisions by this Court, as well as cases decided in the Courts of Appeal.

In *Baltimore & O. S. W. R. Co.* v. *Burtch*, 263 U.S. 540, 544 (1929), this court said:

> "It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it."

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U.S. 90 (1937), a gross receipts tax on the company's

income was invalidated because the act of loading and unloading merchandise from an interstate carrier is an integral and essential part of the interstate journey. This court also said at l.c. 92:

> "No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel."

The foregoing result was reaffirmed in *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), and it was therein specifically stated that stevedoring was obviously a continuation of the transportation.

In *Walling* v. *Consumers Co.*, 149 F.2d 626, 630 (7 Cir. 1945), it was held that:

> "the unloading at destination of an interstate shipment is work in interstate transportation whether done by the carrier or another."

The decision of the Kansas Supreme Court suggests in part that because the petitioner's employees assisted the Page & Hill crane operator in unloading, by guiding the sections into place, that the interstate commerce journey had ceased. That such a conclusion is erroneous is illustrated by the following quotation from *Puget Sound Stevedoring Co.* v. *Tax Commission, supra*, l.c. 94:

> "What is decisive is the nature of the act, not the person of the actor."

Petitioner believes that the Kansas Supreme Court erred in, after three years of litigation, determining that the contractual provision for delivery "F.O.B. Building Site Wyandotte County, Kansas", clearly and unambiguously meant that title passed before the property was unloaded, particularly in view of the diametrically opposed finding of fact of the lower fact finding court. But, notwithstanding this result, petitioner submits that the apparent

inference from the decision of the Kansas Supreme Court that the interstate journey ended at the same time title passed is wholly erroneous. The established rule, and the logical one, is that the interstate character of a shipment is to be determined entirely independent from the question of when and to whom title passes. *United States* v. *Erie R. Co.*, 280 U.S. 98 (1929). *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601 (1939). *Wycoff Co.* v. *Public Service Commission of Utah*, 195 F.2d 252 (10 Cir. 1951). As stated in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943):

> "The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate."

Petitioner further submits that there was no evidence before the Kansas Supreme Court to support an independent finding that the interstate commerce journey ceased before the property became affixed to realty.

The cases in this field of state taxation in which tax assessments have been upheld have all been conditioned upon an express finding of a taxable event separate and distinct from the movement of the goods in interstate commerce. *Joseph* v. *Carter & Weekes Stevedoring Co.*, *supra*. Without such a taxable event, the application of the tax is invalid. As stated in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 166 (1954), wherein the Court invalidated a tax assessed upon the "incident" of taking gas from an independent outlet for the purpose of immediate interstate transmission:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid

if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

In the instant case the local activity, the "use" by petitioner, cannot realistically be distinguished from the unloading, and since the unloading was a part of the interstate process, the alleged "use" cannot be separated from the interstate commerce.

Petitioner submits that a decision by this Court on the question herein presented would clarify many existing uncertainties troubling both state tax officials and private industries attempting to reconcile the permissive application of Use Taxes with the Commerce Clause.

CONCLUSION.

Petitioner, therefore, respectfully requests, for the foregoing reasons, that this Court issue a writ of certiorari to the Kansas Supreme Court to review this case.

Respectfully submitted,

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